

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

Original Affidavit of Marling

77-1428

To be argued by
CAROL B. AMON

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1428

UNITED STATES OF AMERICA,

*B
p/s*
Appellee,

—against—

DAVID KAPLAN,

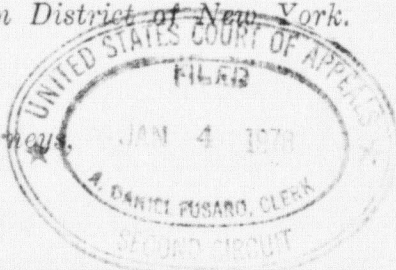
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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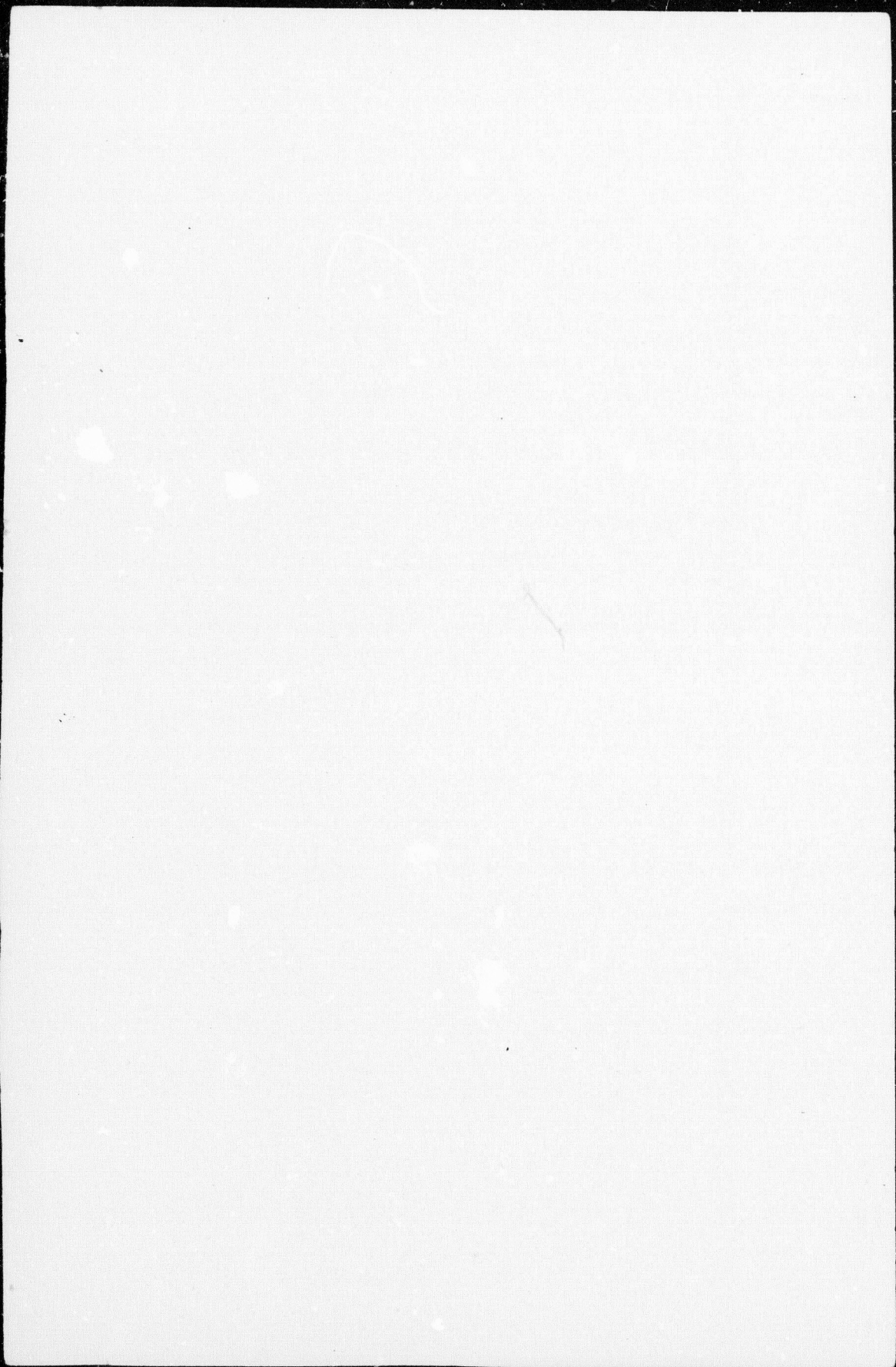


TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of the Case	2
ARGUMENT:	
POINT I—Kaplan's sentence was properly imposed in accordance with due process and is not subject to appellate review	10
A. Information as to Kaplan's alleged rehabilitation was before the court at sentencing	11
B. The court considered all the information brought to its attention, exercised its discretion, and sentenced Kaplan as an individual and not pursuant to a fixed policy	13
C. The weight the court allocated to various factors in determining a proper sentence was within its discretion and not subject to review	16
D. The failure to denote the disposition of Kaplan's arrest for possession of a forged instrument as a youthful offender was not a material inaccuracy nor was it relied upon by the court in imposing sentence	19
POINT II—Kaplan was not entitled on this record to a hearing on the accuracy and adequacy of the probation report	21
CONCLUSION	25

TABLE OF AUTHORITIES

Cases:

<i>Barnes v. Estelle</i> , 518 F.2d 182 (5th Cir.), <i>cert. denied</i> , 423 U.S. 1036 (1975)	20
<i>Dorszynski v. United States</i> , 418 U.S. 424 (1974) ..	10
<i>Townsend v. Burke</i> , 334 U.S. 736 (1948)	19
<i>United States v. Brown</i> , 479 F.2d 1170 (2d Cir. 1973)	11
<i>United States v. Cifarelli</i> , 401 F.2d 512 (2d Cir.), <i>cert. denied</i> , 393 U.S. 987 (1968)	23
<i>United States v. Doyle</i> , 348 F.2d 715 (2d Cir.), <i>cert. denied</i> , 382 U.S. 843 (1965)	23
<i>United States v. Driscoll</i> , 496 F.2d 252 (2d Cir. 1974)	22
<i>United States v. Foss</i> , 501 F.2d 522 (1st Cir. 1974)	14
<i>United States v. Herndon</i> , 525 F.2d 208 (2d Cir. 1975)	22
<i>United States v. Holder</i> , 412 F.2d 212 (2d Cir. 1969)	13
<i>United States v. Malcolm</i> , 432 F.2d 809 (2d Cir. 1970)	12, 18
<i>United States v. Miller</i> , — F.2d —, Docket No. 77-1302, slip op. 529 (2d Cir., November 25, 1977)	14
<i>United States v. Myers</i> , 374 F.2d 707 (3d Cir. 1967)	20
<i>United States v. Needles</i> , 472 F.2d 652 (2d Cir. 1973)	13, 18, 23, 24

	PAGE
<i>United States v. Robin</i> , 545 F.2d 775 (2d Cir. 1976), rehearing denied, 553 F.2d 8 (1977)	10, 11, 24
<i>United States v. Rosner</i> , 485 F.2d 1213 (2d Cir. 1973)	24
<i>United States v. Schawartzberg</i> , 382 F.2d 1012 (2d Cir. 1967), cert. denied, 391 U.S. 928 (1968) . .	22
<i>United States v. Seijo</i> , 537 F.2d 694 (2d Cir. 1976)	10
<i>United States v. Stein</i> , 544 F.2d 96 (2d Cir. 1976)	10, 11
<i>United States v. Sweig</i> , 454 F.2d 181 (2d Cir. 1972)	23
<i>United States v. Tramunti</i> , 513 F.2d 1087 (2d Cir.), cert. denied, 432 U.S. 832 (1975)	10
<i>United States v. Tucker</i> , 404 U.S. 443 (1972)	19
<i>United States v. Valot</i> , 481 F.2d 22 (2d Cir. 1973)	14
<i>Williams v. Oklahoma</i> , 358 U.S. 576 (1959)	23
<i>Williams v. New York</i> , 337 U.S. 241 (1949) . . .	20, 23
<i>Woolsey v. United States</i> , 478 F.2d 139 (8th Cir. 1973)	14
<i>Rules:</i>	
Rule 32(a), Fed. R. Crim. P.	11, 12, 18
<i>Other Authorities:</i>	
1970 U.S. Code Cong. and Admin. News	14

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-1428

UNITED STATES OF AMERICA,

—against—

DAVID KAPLAN,

Appellee,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

David Kaplan appeals from a sentence imposed pursuant to a judgment of the United States District Court for the Eastern District of New York (Mark A. Costantino, J.), entered September 23, 1977, convicting him after his plea of guilty to a single count of conspiracy to import, possess with intent to distribute, and distribute marijuana and hashish in violation of 21 U.S.C. § 846 and § 963. Kaplan was sentenced, pursuant to 18 U.S.C. § 4205(b)(2), to a term of three years imprisonment and a special parole term of five years. Kaplan is presently incarcerated.

On appeal, Kaplan alleges that he was improperly sentenced on the following grounds: first, the failure of the probation officer to visit Kaplan at his job; second, the failure of the court to hear from the pretrial services

officer who supervised Kaplan; third, the judge's reluctance to find the defendant's alleged rehabilitation credible and his opinion that the drug statute under which defendant was sentenced required punishment; fourth, the failure of the sentencing judge to take into account the defendant's six month incarceration in Mexico and the fact that he was shot by a co-conspirator; fifth, the court's failure to treat marijuana differently from any other drug and to hear defense counsel's opinions on the nature of the cocaine found on the defendant; sixth, the judge's reliance upon misinformation regarding the defendant's criminal record; and seventh, the court's denial of Kaplan's request for a hearing regarding information in the probation report.

Statement of the Case

On April 9, 1976, David and Shelly Kaplan were indicted in the Eastern District of New York for conspiring to violate federal narcotics laws between the approximate dates August, 1969 and March, 1974. Specifically, the indictment charged that prior to May 1, 1971, the Kaplans and others conspired to smuggle marijuana and hashish into the United States and to receive, conceal, buy, sell and facilitate the transportation, concealment and sale of quantities of marijuana and hashish which had been imported contrary to law in violation of 21 U.S.C. § 176(a). It was further alleged that after May 1, 1971, the Kaplans and others conspired to import, possess, and distribute quantities of marijuana and hashish in violation of 21 U.S.C. § 846 and § 963. Section 176(a) of Title 21, which was in effect prior to May 1, 1971, provides for a mandatory minimum sentence of five years with a potential maximum sentence of twenty years. Sections 846 and 963 of Title 21, provisions of the current narcotics law, which became

effective May 1, 1971, have no mandatory minimum provisions and in the case of marijuana and hashish, provide for a maximum sentence of five years, a minimum special parole term of two years, and a maximum fine of \$15,000. David Kaplan's parents, Irving and Fay Kaplan, were named in the indictment as unindicted co-conspirators. Bench warrants were issued for the arrests of David and Shelly Kaplan on April 9, 1976.

Shelly Kaplan was apprehended shortly thereafter on April 15, 1976. Subsequent to her arrest, a search warrant was issued for her parents' home and approximately three hundred pounds of marijuana were seized together with color slides of one of David Kaplan's Mexican marijuana ventures (I. 21, p. 1).¹ Shelly Kaplan was thereafter charged in a second indictment with possession with intent to distribute the seized marijuana.

On October 27, 1976, Shelly Kaplan entered a plea of guilty to the second indictment with the understanding that at the time of her sentencing the Government would move to dismiss the conspiracy indictment as to her. Mrs. Kaplan maintained at the time of her plea that the three hundred pounds of marijuana found in her parents' home had been placed there by David Kaplan (Item 5, p. 7, Index to Record on Appeal, *United States v. Shelly Kaplan*).²

On April 1, 1977, Shelly Kaplan was sentenced by the Honorable Henry Bramwell to a prison term of three years and a special parole term of five years. The conspiracy indictment was dismissed as to her.

¹ Since there is no trial transcript in this case, citations, unless otherwise noted, are to items in the Index to the Record on Appeal and the page numbers of that item.

² This marijuana was not attributed to David Kaplan in his probation report.

David Kaplan was not located and arrested until January 21, 1977, over nine months after the issuance of the bench warrant for his arrest. Kaplan was apprehended by agents of the Drug Enforcement Administration (DEA) in a hotel in New York, where he was registered under a false name. Among his personal effects were a sample of cocaine and a driver's license and a birth certificate, both in the alias Philip Matarese (I. 10, p. 21). It was thereafter learned from the Department of State that Kaplan was also issued a fraudulent passport under this same alias. This passport was ordered turned over to the district court as a condition of Kaplan's release on bail.³

Although the exact point in time that Kaplan had knowledge of the indictment and warrant for his arrest is the subject of debate, it is undisputed that he knew of the charges prior to his arrest, that he made no effort to surrender, and that during the nine month period between indictment and arrest he traveled in and out of the United States under an assumed name (I. 10, p. 21); (A. 77a).⁴

On June 10, 1977, Kaplan, pursuant to an agreement with the Government, entered a plea of guilty before Judge Costantino to that portion of the conspiracy indictment dealing with events after May 1, 1971.⁵ By so doing,

³ Bail was originally set in the amount of \$100,000 by Judge Bramwell. The amount of the bail was appealed to this Court, where it was reduced to \$50,000 on the condition that Kaplan turn over all passports in his possession (I. 13, p. 1); (I. 15, p. 5).

⁴ References with the prefix "A" are to pages of defendant's appendix.

⁵ Kaplan's case was originally assigned to Judge Bramwell. Kaplan moved to disqualify Judge Bramwell for, among other reasons, his previous exposure to Shelly Kaplan's case. Although Judge Bramwell initially declined to disqualify himself, he later reversed that decision after Kaplan sought mandamus. Thereafter, Judge Costantino was assigned to Kaplan's case by the random selection method. Attorneys for Kaplan protested, alleging a right

[Footnote continued on following page]

Kaplan was permitted to avoid the mandatory five year sentence under the old law, 21 U.S.C. § 176(a). The Government further agreed not to prosecute Kaplan for the marijuana seized on April 16, 1976 from Shelly Kaplan's parents' home and not to prosecute him in the Eastern District of New York for possession of the cocaine found at the time of his arrest or for utilization of the false passport in the name of Philip Matarese (I. 27, pp. 13-14).

Subsequent to Kaplan's guilty plea, his counsel furnished the court with a fifteen page sentencing memorandum dated July 21, 1977 (A. 13a-27a). In that document, counsel discussed at length the defendant's entire family background, including much detail as to his ill-fated marriage and his recent conversion to both Yoga and employment. In addition, the memorandum detailed Kaplan's version of his involvement in the conspiracy. Thus, Kaplan, through his attorney, admitted to partially financing one Mexican transaction and being a direct participant in two additional Mexican importation schemes. It was further admitted that Kaplan continued to deal in marijuana after his release from jail in Mexico in December, 1972 (A. 19a). In addition to matters pertaining to the defendant's background, the memorandum also placed before the court counsel's speculations as to benefits bestowed upon one of the Government witnesses in return for his cooperation, coupled with an argument as to the relative merits of imposing a jail term on the defendant.⁶

to be present when the name of the new judge was drawn. They requested that Judge Costantino withdraw from the case and that a judge's name be reselected in their presence. This motion was denied (I. 38, pp. 1-23).

⁶ Although a copy of this memorandum was sent to the Probation Department, a copy was not sent to the United States Attorney's Office.

After his plea of guilty, Kaplan met with the probation department and made a special request that he not be assigned the same probation officer who prepared the report on his wife. This request was granted. The probation officer assigned to Kaplan prepared a detailed thirty page report dated July 25, 1977.⁷ The report was made available to the defendant for his review shortly after it was prepared. The report summarized the evidence the Government intended to prove at trial covering the entire time period of the conspiracy and certain drug dealings thereafter (P. 3-9).⁸ Every aspect of Kaplan's background was discussed including his prior criminal record (P. 10-12), information pertaining to his family members and their statements about Kaplan (P. 15-18), his marital status (P. 18-20), his residences (P. 20-21), his religion and feelings about religion (P. 23-24), his health (P. 24-26), his education (P. 21-22), his own personal statement (P. 10), and his mental and emotional state (P. 26). With respect to the question of his employment, the probation officer stated in the report that prior to Kaplan's arrest on the instant indictment, the

⁷ Copies of the probation report will be forwarded to the panel prior to oral argument. References with prefix "P" are to pages of the probation report.

⁸ The report recounted the statements of one witness that between 1969 and 1973, he purchased \$141,640 worth of hashish from David and Shelly Kaplan (P. 4). Specific details as to similar purchases by another witness for the period 1969 through 1970 were also reflected, and the Government's evidence as to Kaplan's Mexican importation ventures was likewise set forth (P. 5-7). In addition, evidence as to Kaplan's post-conspiratorial narcotics activities was detailed, including the fact that DEA agents in Boston purchased cocaine from a man who identified Kaplan as his source and that telephone calls to arrange the sales were made to a house where Kaplan was then residing (P. 8). Further, in 1976, after Kaplan was indicted and before he was arrested, it was reported that he was suspected of having negotiated with a British undercover customs agent in London to import 4,000 pounds of hashish from Amsterdam (P. 9). Finally, the report alleged that David and Shelly Kaplan were local distributors of methamphetamine pills, which they were believed to have obtained from a Canadian pharmaceutical firm (P. 8).

defendant had no verifiable employment (P. 27). However, his work record since his arrest was cited, including laudatory quotes from his employers (P. 26-27). It was further noted that the pre-trial services officer to whom Kaplan reported as a condition of his bond had stated that Kaplan abided by all conditions imposed by that agency (P. 13).

Kaplan responded to the probation report in a twelve page personal letter to the sentencing judge dated August 11, 1977. In that letter, Kaplan stated that he did not think that the report "reflected a fair judgment" of him (A. 28a). Kaplan went on to explain at length who he was and how he had changed. However, Kaplan did not challenge any of the statements made in the report regarding his drug activities (A. 28a-39a).

Thereafter, counsel for Kaplan in a seven page letter to the court, dated September 14, 1977, attacked the probation report (A. 40a-46a). In addition to taking issue with the evaluative summary of Kaplan by probation, counsel further alleged that the investigation was inadequate, primarily because the probation officer did not spend a day with Kaplan at the Yoga Center and at his job. With respect to the portion of the report dealing with the details of the offense, only one allegation contained therein was specifically denied as false—the allegation that the Kaplans were local distributors of methamphetamine pills (A. 42a). With respect to the information pertaining to narcotics activities prior and subsequent to the time period covered by Kaplan's plea, counsel challenged that information not as false but as based on speculation and hearsay (A. 43a). Counsel's letter concluded with a general request for a hearing on both the "accuracy and adequacy" of the report.⁹

⁹ Although a copy of this letter was sent to the Probation Department, a copy was not served on the United States Attorney's Office.

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On September 23, 1977, Kaplan appeared for sentencing. Prior to imposing sentence, the judge made reference to counsel's September 14th letter and requested that counsel state his objections to the probation report and offer anything he wished by way of mitigation (A. 54a). After some colloquy, the court again specifically asked counsel whether or not he took issue with the "factual statements made as to your client's background involving the hashish, the cocaine, the marijuana, the pilot that went down to Mexico . . ." (A. 61a). The court continued emphatically:

I am asking you whether or not it's factually incorrect, and if it is, I want you to tell me so because you have an absolute right to attack a factually incorrect statement made in a probation report, and I will give you that right (A. 61a-62a).

Kaplan's attorney responded that the defendant was "not reneging on what he pleaded to before your Honor" (A. 62a). Upon further pressing by the judge, counsel stated that it was specifically denied that the Kaplans in late 1973 were major distributors of pills (A. 63a). The judge accepted Kaplan's denial of that allegation (A. 64a). Later, the court inquired of counsel whether he challenged the statement that Kaplan's drug activities continued past 1974 into 1976 (A. 74a). Counsel did not deny the allegation, but argued that Kaplan should not be sentenced for anything other than what he pled guilty to. The judge replied in part:

There are statements in the probation report that he was involved in some continuing activity but we do not place emphasis on extrinsic alleged crimes. I'm only accepting it as far as background is concerned, and not sentencing him on the basis of those activities (A. 74a-75a).

Kaplan's attorney further disputed the statement in the probation report that Kaplan's arrest for forgery, dis-

posed of by way of a conditional discharge, had resulted in a criminal "conviction." The judge agreed that a conditional discharge could be imposed for a violation and emphasized that it was not the conviction as such that he considered in pronouncing sentence, but rather "the man's attitude and his involvement, whether it be criminal or not; sociologically, economically and criminal, all three" (A. 75a). The judge went on to say that he knew how "to read a probation report conservatively" (A. 76a).

In addition to considering counsel's remarks, the court specifically solicited Kaplan's own personal statement, permitted the defendant's mother, Mrs. Fay Kaplan, to speak, and gave Kaplan's father, Irving, an opportunity to address the court (A. 68a-72a).

Before imposing sentence, the judge noted the following: that he had received defense counsel's letter of September 14 and was aware of the defendant's position that the probation report reflected only the dark side of his life (A. 54a); that he was "extremely familiar" with the probation report and everything that counsel submitted on behalf of Kaplan (A. 58a); that he had seen all the letters regarding Kaplan's new job (A. 58a); that he was familiar with Kaplan's marital situation (A. 78a); and that he took into consideration everything counsel had said at sentencing (A. 86a). The court concluded with the statement that:

. . . the court has given extensive time not only to the material submitted but also in viewing the probation report, listened to Mr. Beldock allocute in behalf of his defendant; given some very salient points as to present rehabilitation presumably as far as viable employment is concerned and other matters.

The court noted that it must exercise discretion in this matter and imposed a sentence of three years, and a special

parole term of five years. In conclusion, the judge observed that he had originally intended to give Kaplan a fine but had decided against it (A. 87a).

POINT I

Kaplan's sentence was properly imposed in accordance with due process and is not subject to appellate review.

In his first point on appeal, Kaplan alleges numerous errors in the sentencing procedure which he claims collectively deprived him of due process. These contentions are without merit.

This Court has recently reaffirmed the well-settled principle that sentencing is a matter totally within the discretion of the trial judge and that generally a sentence within the statutory limits is not subject to review. *United States v. Robin*, 545 F.2d 775, 779 (2d Cir. 1976), *rehearing denied*, 553 F.2d 8 (1977); *United States v. Stein*, 544 F.2d 96, 101 (2d Cir. 1976); *United States v. Seijo*, 537 F.2d 694, 700 (2d Cir. 1976). See also *Dorszynski v. United States*, 418 U.S. 424, 431 (1974). Kaplan concedes, as he must, that the three year sentence imposed on him by the district judge is well within the five year statutory limit. Clearly, therefore, he is not entitled to appellate review of the claim that his sentence was excessive (Appellant's Brief, p. 12). *United States v. Stein*, *supra* at 101; *United States v. Seijo*, *supra* at 700; *United States v. Tramunti*, 513 F.2d 1087, 1120 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975).

Appellate review of a sentence is appropriate only in the limited circumstance where a defendant can demonstrate that the sentencing judge acted on the basis of materially incorrect information or constitutionally im-

permissible factors. *United States v. Robin*, *supra* at 779; *United States v. Stein*, *supra* at 101; *United States v. Brown*, 479 F.2d 1170, 1172 (2d Cir. 1973). Kaplan makes no such showing in this case. To the extent possible, each of defendant's spurious claims will be dealt with in the order raised by defendant.

A. Information as to Kaplan's alleged rehabilitation was before the court at sentencing.

Initially, Kaplan complains that the probation officer failed to visit him at his job and at the Yoga Center to observe him firsthand at work and at meditation. As a consequence, he maintains that the presentence report was superficial and inadequate on the subject of his post-arrest efforts to rehabilitate himself. Kaplan further contends that this error was exacerbated by the court's statement that it was unnecessary to hear from the pre-trial services officer who supervised defendant on the question of his rehabilitation. Finally, Kaplan argues that the failure of the court to hear from the pretrial services officer denied him his right pursuant to Rule 32(a), Fed. R. Crim. P., to "present evidence in mitigation of punishment". There is no merit to these contentions.

There can be no question that the issue of Kaplan's alleged rehabilitation was fully before the sentencing judge. The judge was supplied with numerous letters from various friends and associates attesting to Kaplan's rehabilitation. Moreover, counsel for Kaplan discussed the issue in depth in two detailed letters to the court (A. 13a-27a; 40a-46a). Kaplan himself in a twelve page letter to the judge explained how he had corrected his "foolish actions" and was now supported by a "new constructive life in service to others" (A. 28a-39a).

Further, the probation report documented Kaplan's interest in Yoga (P. 23) and his post arrest employ-

ment (P. 26-28). The report also took note of the laudatory comments of Kaplan's employers. In addition, the probation report stated that the pretrial services officer supervising Kaplan had reported that Kaplan abided by all the conditions imposed by that agency (P. 13).

Indeed, Kaplan does not argue that the probation report contained any materially incorrect information with respect to his employment. Rather, his argument is that it should have said more. However desirable that may have been for Kaplan, it is hardly a subject for appellate review.

Kaplan's contention that the failure of the court to hear from the pretrial services officer on the question of Kaplan's rehabilitation was in violation of Rule 32(a) likewise fails. Not only was the court already deluged with letters detailing Kaplan's alleged rehabilitation and extensive statements by counsel on this issue, but the fact that Kaplan abided by the conditions imposed by the pretrial services agency was already before the court. Certainly, there is no requirement that the court hear from every witness who may have something favorable to say about the defendant.¹⁰

United States v. Malcolm, 432 F.2d 809 (2d Cir. 1970), which Kaplan cites in support of his arguments pertaining to the probation report and the pretrial services officer, is clearly distinguishable. In *Malcolm*, the defendant had cooperated with local police authorities and neither the prosecutor nor defense counsel was permitted to explain this to the court. *Id.* at 817-819.

¹⁰ Counsel did not allege, at the time of sentencing or for that matter on this appeal, any basis for believing that the pretrial services officer would say anything more favorable than that David Kaplan abided by the conditions imposed by the agency.

Moreover, it was not this error alone that required reversal; the sentencing judge was additionally confused about the defendant's criminal record, a record which he relied on in imposing sentence. *Id.* at 816. Thus, Malcolm's sentence was vacated because of a "combination of procedural irregularities, confusion, misunderstanding and misinformation in the sentencing process." *Id.* at 819. In direct contrast to *Malcolm*, the instant record makes clear that the issue of Kaplan's rehabilitation was fully aired before the court.

Although defendant protests to the contrary, the real crux of his concern is not that probation and the court were not fully aware of his claim to have been rehabilitated, but that they were not overly impressed by it. However, having afforded a defendant the opportunity to present his side of a story, a judge does not have to credit it.¹¹ *United States v. Needles*, 472 F.2d 652, 658 (2d Cir. 1973); *United States v. Holder*, 412 F.2d 212, 215 (2d Cir. 1969).

B. The court considered all the information brought to its attention, exercised its discretion, and sentenced Kaplan as an individual and not pursuant to a fixed policy.

Defendant has failed to demonstrate, and indeed the record clearly refutes, any claim that the judge failed to individualize Kaplan's sentence.

For, contrary to Kaplan's contention, it is not improper for a judge to hold the view that the drug statutes

¹¹ There is evidence in the record, however, that the judge did consider Kaplan's post-arrest employment before imposing sentence, for the judge noted that Kaplan's attorney had made "very salient points as to present rehabilitation" (A. 87a).

require punishment, as long as the judge recognizes, as the sentencing judge did here, that this position is not an inflexible one in the face of mitigating factors. It is clear from the legislative history of the 1970 Comprehensive Drug Abuse Prevention and Control Act that Congress intended that the distribution of drugs be dealt with severely. See 1970 U.S. Code Cong. and Admin. News at 4566-4576; see also *United States v. Valot*, 481 F.2d 22, 27 (2d Cir. 1973). Moreover, it is not improper for the judge to give prominence to the deterrent feature of the sentence. *United States v. Foss*, 501 F.2d 522, 528 (1st Cir. 1974).

In this case, the court did not announce a policy of imposing a jail sentence in every narcotics case. See, e.g., *Woolsey v. United States*, 478 F.2d 139, 143-145 (8th Cir. 1973). To the contrary, the judge specifically noted that punishment was not the only consideration and that in fixing on a penalty, he was taking into account a number of considerations, including Kaplan's background and the extent of Kaplan's involvement in the crime (A. 85a-86a). See *United States v. Miller*, — F.2d —, Docket No. 77-1302, slip op. 529 (2d Cir., November 25, 1977). Indeed, in referring to the drug statute, the court fully concurred in counsel's observation that:

It neither says you must or you need not punish—and punishment has to do with the person who stands before you on the date of sentence. (A. 59a).

The judge's remarks were far less subject to an interpretation of a fixed policy than those found acceptable by this Court in the *Miller* case. In *Miller*, the defendant argued that the district judge's comments that "in case of a drug offense some punishment must be imposed" and that it was his "policy" to mete out a "sentence" for such offenses demonstrated a uniform policy and a

failure to individualize Miller's sentence. *Id.* at 531. Finding no impropriety, this Court observed:

. . . we take the judge's remarks considered as a whole to mean, not that imprisonment is mandatory in all drug cases, but that the fact of imprisonment in most drug cases in the district was a factor to be considered, in the light of the desirability of some uniformity of treatment among those similarly situated, and that the judge considered drug cases serious enough to merit a "sentence". *Id.* at 532.

Certainly, Judge Costantino's remarks, particularly as later amplified, are to be similarly interpreted.

Throughout the sentencing proceedings the judge repeatedly referred to the fact that he was familiar with Kaplan's entire background, including the letters submitted on defendant's behalf, and that he took into consideration everything counsel said at sentencing (A. 58a). Moreover, directly before imposing sentence, the court stated that it had given extensive time "not only to the material submitted but also in viewing the probation report, and listened to Mr. Beldock allocute on behalf of his defendant". The judge noted that counsel had given "some very salient points as to present rehabilitation". Having considered all these matters, the judge stated that he was exercising his discretion in imposing a sentence of three years and a special parole term of five years, a sentence substantially less than the maximum. Finally, the judge observed that he had originally intended to impose a fine, but, presumably having listened to points made by defendant's counsel, would not do so (A. 87a).

It is clear from the foregoing that the court properly exercised its discretion in imposing sentence on Kaplan, and Kaplan's complaint that the judge refused to find his rehabilitation credible is meritless. First of all, as stated previously, it is well within the judge's province to

so find. Secondly, it appears from the judge's remarks before imposing sentence that he did consider rehabilitation. Certainly, Judge Costantino concluded that some factors enumerated by the defense were favorable to Kaplan, since he did not impose the maximum sentence.

Accordingly, any argument that the court exhibited a fixed and mechanical approach in sentencing Kaplan is belied by the record.

C. The weight the court allocated to various factors in determining a proper sentence was within its discretion and is not subject to review.

Under a category defined as "other errors", Kaplan, in a shotgun approach, contends that his sentencing was based on the court's misunderstanding of a series of mitigating and negative factors. Among them, Kaplan lists the judge's failure to give consideration both to the time Kaplan was incarcerated in Mexico and to the fact that he was shot by a co-conspirator. Kaplan also contends that the judge erred in failing to treat marijuana differently from any other drug and in curtailing counsel's explanation of the cocaine found on Kaplan at the time of his arrest.¹²

¹² Kaplan urges, as additional support for his position that his sentence should be vacated, that probation did not conduct extensive enough interviews with his parents and that the probation report improperly referred to him as a "fugitive". Even were these allegations true, they hardly provide a basis to vacate his sentence. As discussed above, appellate review of the sentencing process is extremely limited. The adequacy or sufficiency of a probation report is not a matter subject to review. Kaplan's claim that he was improperly referred to as a "fugitive" is the ultimate semantical attack. Whether or not "fugitive" was the precisely correct legal term, it certainly was applicable in its common usage. Call it what you will, the operative facts were that Kaplan was aware that there was a warrant for his arrest, assumed a false identity, and for nine months managed to elude the police. It was these facts that were significant and not the terminology employed to describe this activity.

First, Kaplan's claim that the court refused to credit the time spent by Kaplan in a Mexican jail because of its misunderstanding of the law of double jeopardy rests on what can only be described as a tortured interpretation of the judge's remarks. In counsel's letters to the court and at sentencing, he repeatedly tried to impress upon the court that Kaplan entered a plea of guilty to an offense which was in essence the same crime he was punished for in Mexico.¹³ The judge's passing comment to double jeopardy, although not the technically appropriate term to have employed, cannot be interpreted to mean that the judge entirely discounted the Mexican incarceration, although it was within his discretion to do so, or that if he did discount the Mexican incarceration, he did so because of a misunderstanding of the application of the double jeopardy rule.

Rather, the import of the judge's remarks was that Kaplan's involvement was more extensive than the matter for which he was arrested and prosecuted in Mexico, i.e., that Kaplan's case was not a double jeopardy situation. After counsel argued that Kaplan's imprisonment in Mexico was punishment enough, the court responded, "[f]or what he did in Mexico", indicating, if anything, that the court was crediting the Mexican imprisonment towards that aspect of Kaplan's admitted drug activities, but was concerned about his other marijuana dealings (A. 78a). It is undisputed that Kaplan continued dealing in marijuana subsequent to his release from jail in Mexico (A. 19a). Indeed, it would have been entirely proper for the court to have viewed Kaplan as a repeat offender.

¹³ The Government by no means acquiesces in counsel's statements, first, that Kaplan admitted his first Mexican trip to the Mexican Government or secondly, that when Kaplan was arrested in Mexico and in 1973 when the DEA file was closed as to that matter, that the Government was aware of his prior Mexican trip or the extent of his drug dealings from 1969 through 1973.

Thus, the record simply does not support the contrived inferences defendant attempts to draw from the judge's remarks. The significance and weight accorded Kaplan's prior incarceration were well within the discretion of the sentencing judge and are not subject to appellate review. Similarly, the judge had discretion to accord whatever significance or lack of significance he deemed appropriate to the fact that Kaplan was shot by one of his co-conspirators during the course of the conspiracy.¹⁴ *United States v. Malcolm, supra* at 819; *United States v. Needles, supra* at 658.

Defendant's contention that he was improperly sentenced because the judge failed to recognize the difference between marijuana and other drugs is another example of "creative" reading of a transcript. The point the judge was making was that there is an important distinction between one who uses a drug and one such as Kaplan who "peddles" it and that this distinction holds true regardless of the drug—an observation one can hardly quarrel with (A. 82a).

Although Kaplan does not cite to a violation of his right pursuant to Rule 32(a), Fed. R. Crim. P., to present evidence in mitigation of punishment, that is apparently the basis for his claim that the court erred in refusing to hear counsel on the subject of the cocaine found in Kaplan's shoe at the time of his arrest.

First of all, it should be noted that no statement was made by the Government, either in the probation report or at any other time, that Kaplan was believed to be dealing in cocaine based on the amount of cocaine found

¹⁴ The Government should not by its silence be deemed to have verified Kaplan's speculations as to agreements made with or benefits bestowed on government witnesses or Kaplan's version of the shooting incident. It is our position that those matters are not relevant to this proceeding.

in his shoe. Thus, Kaplan was not in the position of refuting a challenged allegation. More importantly, however, the record does not reflect that Kaplan's attorney was in any way prohibited by the court from pursuing the points he wished to make. The fact that counsel feared that he may be "exacerbating the situation" and changed the subject was a strategical decision he made and not the product of any coercion on the court's part. Accordingly, defendant's claim in this regard is without merit.

D. The failure to denote the disposition of Kaplan's arrest for possession of a forged instrument as a youthful offender was not a material inaccuracy nor was it relied upon by the court in imposing sentence.

Kaplan contends that his sentence must be vacated because the judge was under the mistaken impression, as a result of an inaccuracy in the probation report, that defendant was convicted of possession of a forged instrument in the second degree and given a conditional discharge when in fact he was not "convicted" but was adjudicated a youthful offender. Defendant attempts to magnify the significance of this error by reasoning that had it been known in the beginning that this arrest resulted in youthful offender treatment, it would have somehow excused the failure of Kaplan to mention the "arrest" to the probation officer and everyone would have thought better of David Kaplan.

As stated previously, for a sentence to be vacated on the ground that there was misinformation before the court, that misinformation must be both material and relied upon by the sentencing judge. *United States v. Tucker*, 404 U.S. 443 (1972); *Townsend v. Burke*, 334 U.S. 736, 740-741 (1948). In this instance, the error complained of was neither material nor relied upon by the judge in imposing sentence.

First of all, the charge itself, possession of a forged instrument in the second degree (a driver's license), is insignificant when compared with seriousness of the charge for which Kaplan was being sentenced. See *Barnes v. Estelle*, 518 F.2d 182, 183 (5th Cir.), *cert. denied*, 423 U.S. 1036 (1975). The significance becomes more attenuated when the nature of the error is examined. Thus, it is not argued that defendant did not possess a forged driver's license but only that by receiving youthful offender treatment, he was not technically "convicted" of a crime and thus does not have a prior record in the United States.

There is nothing in the Constitution that prevents a sentencing judge from considering a juvenile record for purposes of sentencing. *United States v. Myers*, 374 F.2d 707, 708 (3d Cir. 1967). Hence, defendant cannot complain that the fact of the arrest was improperly before the court. Secondly, it is well-settled that a judge can consider for purposes of sentencing criminal conduct not resulting in a conviction. *Williams v. New York*, 337 U.S. 241, 246-247 (1949).

Moreover, to the extent that the sentencing judge put any emphasis whatsoever on this incident, it is clear that reliance was not placed on the fact that it was a prior conviction. As the judge stated in reference to counsel's argument that this offense did not result in a criminal conviction: "We are not talking about criminal records. We are talking about the man's attitude and his involvement, whether it be criminal or not; sociologically, economically, and criminal, all three" (A. 75a).

Kaplan's argument that the error resulted in giving the mistaken impression that Kaplan was not candid is similarly unpersuasive. The statement in the probation report was that Kaplan did not mention this "arrest".

This statement is accurate and is not changed by the fact that the arrest did not result in a conviction.

POINT II

Kaplan was not entitled on this record to a hearing on the accuracy or adequacy of the probation report.

Kaplan contends that he was improperly denied a hearing on the "accuracy and adequacy" of information contained in the probation report, specifically that information pertaining to his extensive dealings in narcotics from 1969 through 1976. This contention, like the others advanced by Kaplan on this appeal, is groundless.

The probation report of which Kaplan complains summarized in some detail the anticipated testimony of government witnesses as to Kaplan's dealings in narcotics. In his letter of September 14, 1977, Kaplan's attorney challenged as false only one statement in the report—the claim that David and Shelly Kaplan in 1973 were distributors of methamphetamine (A. 42a). Without any specific references, counsel also objected to "much of the negative information" in the report pertaining to Kaplan's activities before and after the dates of the conspiracy, not on the basis that it was false but because it was "speculative and hearsay" (A. 43a).¹⁵

At the outset of the sentencing proceeding, the court requested that defendant's attorney inform it of any objections he had to the probation report (A. 54a). The

¹⁵ In his letter to the court dated August 11, 1977, Kaplan, although he complained about certain aspects of the probation report, was silent as to any factual errors as to his involvement in drugs.

judge then asked counsel a second time whether or not he took any specific issue with factual statements in the probation report, emphasizing that Kaplan had an "absolute right to attack a factually incorrect statement made in a probation report" and that he would be given that right (A. 61a-62a). In response, Kaplan's attorney referred to only one statement in the probation report which he claimed was false—the allegation that Kaplan and his wife were distributors of methamphetamine in 1973. The court informed counsel that it would accept the defense position that the allegation was false (A. 64a). Counsel then declared without any elaboration, that the methamphetamine allegation was "typical of the pile on information that came from informants to Kaplan's doorstep". So stating, counsel moved on immediately to his next point (A. 64a). Thereafter, the court again inquired of Kaplan's attorney whether he took issue with the allegations of Kaplan's continuing narcotics activities in 1974 and 1976. Counsel's only response was to the effect that Kaplan should not be sentenced on those matters (A. 74a).

First of all, defendant's claim that the methamphetamine allegation was false and that he was entitled to a hearing on this matter is put to rest by the statement of the judge that he would accept Kaplan's position that it was false. Defendant is not entitled on this appeal to go behind the judge's statement. See *United States v. Herndon*, 525 F.2d 208, 209 (2d Cir. 1975); *United States v. Driscoll*, 496 F.2d 252, 253 (2d Cir. 1974); *United States v. Schawartzberg*, 382 F.2d 1012, 1013 (2d Cir. 1967), *cert. denied*, 391 U.S. 928 (1968).

Secondly, apart from counsel's reference to the methamphetamine allegation, it was unclear at the time of sentencing what other informant information was being contested. In his September 14, 1977 letter, de-

fendant's attorney referred in vague terms to "much of the negative information" in the report. At sentencing, he made only a passing reference to "pile-on information". Although clearly given the opportunity on several occasions to specify the other statements he claimed to be false, counsel did not do so. Moreover, to the extent that the defendant was challenging this other unspecified, undefined information as "hearsay", as counsel's letter of September 14th states, his objection was unfounded. It is well-settled that a sentencing judge is not "restricted to evidence derived from the examination and cross-examination of witnesses in open court, but may consist[ist] with the Due Process Clause of the Fourteenth Amendment, consider responsible unsworn 'out of court' information relative to the circumstances of the crime and to the convicted person's life and characteristics". *Williams v. Oklahoma*, 358 U.S. 576, 584 (1959). See also *Williams v. New York*, *supra* at 248-250; *United States v. Needles*, *supra* at 658. Thus, it has been specifically held in this Circuit that in sentencing, a court may consider hearsay, *United States v. Sweig*, 454 F.2d 181, 183-184 (2d Cir. 1972), prior crimes of which the defendant has not been convicted, *United States v. Cifarelli*, 401 F.2d 512, 514 (2d Cir.), *cert. denied*, 393 U.S. 987 (1968), and charges dismissed without a determination on the merits, *United States v. Doyle*, 348 F.2d 715, 721 (2d Cir.), *cert. denied*, 382 U.S. 843 (1965).

Furthermore, defendant's contention that the Government must come forward at a hearing and substantiate hearsay allegations is likewise without merit. Were that so, every sentencing proceeding would be a mini-trial. As this Court noted in *Needles*, *supra* at 658, in referring to the sentencing procedure:

As such it does not lend itself, to the procedural formality of a trial; there is no definite set of criteria and no required weight to be allocated to

Each consideration of many of the matters reviewed cannot readily be measured, quantified, proved or disproved, and some come from confidential sources. Hence, it has not been required that each statement in a pre-sentence report be established or refuted by presentation of evidence.

Whether or not a hearing is required to resolve disputed statements in a probation report is a matter within the sound discretion of the sentencing judge. *United States v. Needles*, *supra* at 658. This Court has not ordered hearings in cases where there were sharply disputed issues of fact. *United States v. Robin*, *supra* at 779; *United States v. Rosner*, 485 F.2d 1213, 1230 (2d Cir. 1973). In this instance, where the allegations Kaplan was contesting were unspecified, where he was given every opportunity to present his version of the events, and where it is apparent from the judge's own remarks that he placed little, if any, emphasis on the "extrinsic alleged crimes" alluded to in the probation report (A. 74a-75a), the judge properly exercised his discretion in denying a hearing.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: Brooklyn, New York
December 28, 1977

Respectfully submitted,

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CAROL AMON

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 3rd day of January 1978 he served a copy of the within Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:
Elliot Sagor, Esq., 565 5th Avenue, New York, N.Y. 10017

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ^{225 Cadman Plaza East} ~~Washington Street~~, Borough of Brooklyn, County of Kings, City of New York.

Carol P. Amon

Sworn to before me this

3rd day of January 1978

Barbara Allen

BARBARA A. ALLEN
Notary Public, State of New York
No. 24-4936824
Qualified in Kings County
Commission Expires March 30, 1979